IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 393 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NILESHBHAI ARJANBHAI KALTHIYA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 393 of 2004

MR YN RAVANI for Petitioner No. 1

RULE SERVED for Respondent No. 1-2

MR AY KOGJE, APP for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 06/07/2004

ORAL JUDGEMENT

#. By filing this petition, the petitioner-detenu has

challenged his detention order dated 23.12.2003. By the said order, the petitioner is detained as a "bootlegger" under P.A.S.A. Along with the order of detention, the petitioner is also served with the grounds of detention. In the grounds of detention, there is a reference about two criminal cases pending against the petitioner under the Bombay Prohibition Act. It is alleged that the petitioner is illegally dealing in foreign liquor and, therefore, the cases are filed against the petitioner at D.C.B. Police Station, Surat. According to the detaining authority, his activities are required to be curbed by detaining the detenu under the P.A.S.A. as he is a bootlegger. After considering the aforesaid two registered cases and the statements of two witnesses whose names have been withheld under Section 9(2) of the Act, the petitioner has been detained under the preventive detention. It is the aforesaid order which is under challenge in this petition.

#. Learned counsel for the petitioner submitted that though two separate criminal case numbers are given, practically, there is only one incident and therefore for such solitary case the petitioner is not required to be detained under the preventive detention. In any case, the petitioner is dealing in the foreign liquor and therefore it may attract law and order situation and not the public order. It was next argued that the detaining authority without proper material before it exercised the powers under Section 9(2) of the Act. He submitted that in view of the decision of this Court in Special Civil Application No.433 of 2004 dated 29.06.2004, the powers exercised by the authority under Section 9(2) of the Act can be said to have been vitiated.

#. So far as the first argument is concerned, Mr.Kogje learned A.G.P. submitted that there are two FIRs and there are two separate incidents and therefore it cannot be said that the petitioner is involved only in one registered criminal case. He submitted that consumption of liquor is injurious to health and therefore it will even affect the public health and therefore the petitioner can be detained under the preventive detention. So far as withholding of the names of the witnesses under Section 9(2) is concerned, he submitted that it is, no doubt, true that the authority has not tried to verify the antecedents of the detenu as observed by this Court in the above referred judgment. He submitted that, however, looking to the high-handed attitude of the petitioner and since the detaining authority found that the apprehension of the witnesses is genuine, such names were withheld in the public interest.

#. So far as the first argument is concerned, it cannot be said that there is only one case since two different numbers of the cases are given. However, so far as the question about withholding of the names under Section 9(2) of the Act is concerned, this Court vide its judgment dated 29.06.2004 rendered in Special Civil Application No. 433 of 2004 has held as under :

" Mr.Prajapati, learned advocate for the petitioner submitted that before claiming privilege under Section 9(2) of the Act, the authority has not tried to verify about the credentials and character of the detenu. He submitted that the privilege is claimed in a routine manner and, therefore, without any basis the authority has tried to withhold the names of witnesses and as a result of that the petitioner is denied the valuable right of making effective representation. To substantiate his say, Mr.Prajapati has relied upon the decision of this Court rendered in the case of Kishor Nagjibhai Parmar V/s State of Gujarat reported in 2000 (4) G.L.R. 3236, wherein it is held in para 11 as under :

" In this view of the matter, the detaining authority while exercising powers under Section 9(2) of the P.A.S.A.Act for claiming privilege is expected to consider the general background, character, antecedents, criminal tendency of propensity etc. of the detenu. In the instant case, if affidavit or the grounds of detention are considered, all that is recorded by the detaining authority is that the fear expressed by the witnesses is found to be genuine and correct by the detaining authority. The detaining authority has recorded that it has carefully scrutinized, examined and considered all the materials that were produced before him by the sponsoring authority. It is, therefore, clear that the detaining authority, while verifying the statements of the witnesses and while considering the question of exercising privilege under Section 9(2) of the P.A.S.A.Act, has not taken any independent steps for considering general background, character, antecedents, criminal tendency etc. while recording subjective satisfaction, but has relied solely on the material produced by the sponsoring authority. There is no contemporaneous record to indicate

> the steps taken by the detaining authority and the grounds and reasons for arriving at the subjective satisfaction. It is therefore very difficult to conclude that the detaining authority has considered general background, character, antecedents, criminal tendency and propensity etc. of the detenu while arriving at the subjective satisfaction, for the need of exercise of powers under Section 9(2) of the P.A.S.A. Act and claim privilege by not disclosing identity of the anonymous witnesses."

#. Since in this case, such exercise has not been done, and no antecedents of the detenu, as observed by this Court, are ascertained by the detaining authority and even though this point is taken in the petition, no affidavit-in-reply is placed on record and for want of explanation in this behalf, this petition is required to be allowed in view of the averments made in the petition which are not controverted. Under these circumstances, if the statements of the witnesses are taken out of consideration, only the aforesaid so called two criminal cases under the Prohibition Act remain in the field. The Division Bench of this Court has taken the view that if the statements are taken out of the record, on the basis of the registered criminal cases, it cannot be said that there is a violation of the public order but it would be a situation wherein question of law and order is involved.

#. Considering the aforesaid aspects of the matter and considering the fact that only two criminal cases are registered under the Bombay Prohibition Act, it can be said that it may not attract the situation of public order but it may attract the situation of law and order.

#. It is pointed out by Mr.Ravani that even otherwise the petitioner is not a habitual offender because during the pendency of this petition, the petitioner got married. This Court has released the petitioner temporarily on parole and there is nothing to show that during the intervening period, the petitioner was found to have indulged in illegal activities. He submitted that even thereafter the petitioner has surrendered himself in time. He submitted that the petitioner has recently married and therefore the Government should have also revoked the order. It is, no doubt, true that the petitioner was released temporarily on parole. However, in my view, that point itself cannot be taken into consideration while deciding the present petition and the aforesaid aspect has no relevance so far as the detention

order is concerned which is impugned in this petition.

#. In view of the judgment referred above, the order of detention is required to be set aside, as, it cannot be said that privilege is properly claimed by the authority under Section 9(2) of the Act, and also on the ground that the breach of public order is not established.

#. For the foregoing reasons, this petition is allowed. The order of detention dated 23.12.2003 is quashed and set aside. The detenu, Nileshbhai Arjanbhai Kalthiya is ordered to be set at liberty forthwith, if he is not required in connection with any other case. Rule is made absolute.

(P.B.MAJMUDAR,J)
(pathan)